HONGKONG & SHANGHAI BANKING CORP.

v.

TIMOR ELECTRIC CABLE & WIRE SDN. BHD. & ORS.

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[SUIT NO. KG. 276 OF 1988]
20 MAY 1991

CIVIL PROCEDURE: *Application to strike out defence - Matter settled - Defendant's application to dismiss action - Delay in effecting service of summons - Notice of discontinuance - Leave - Question of costs when matter settled - Merits - Earlier order of costs - Court's discretion - Rules of the High Court 1980, O. 21 r. 3.*

The plaintiff commenced proceedings for recovery of various sums of money from the 1st defendant, D1 as principal and against the six other defendants D2 to D7 as guarantors. Judgment in default of appearance was entered against D1 and D7, which included taxing of costs on a solicitor client basis. Plaintiff then sought to strike out D5's defence. The other defendants settled the judgment debt and costs and the action against them was discontinued. D5 filed for dismissal of the plaintiff's action for want of prosecution or as being vexatious or an abuse of the process of the Court as there had been delay in effecting service of the summons on D5. The plaintiff then sought leave to discontinue this action and for costs. The issue for the Court was the question of costs.

Held:

[1] As the matter had been settled, there was no need to go into the merits of the case even though there was a prior order for costs. It was therefore fair and just to strike out the plaintiff's application to strike out D5's defence. In exercise of the Court's discretion, there would also be no order for costs.

[2] In the circumstances of this case, the proper order is to give leave to the plaintiff for the action to be discontinued and in the exercise of the discretion of the Court under O. 21 r. 3, order that each party pays it own costs.

[Order accordingly.]

Cases referred to:
Computer Machinery Co. Ltd. v. Drescher & Ors. [1983] 3 AER 153 ***(cons)***
J.T. Stradford & Son Ltd. v. Lindley & Ors. (No. 2) [1969] 1 WLR 1547 ***(dist)***
Lum See On v. Chan Kit Yong [1956] 22 MLJ 40 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 21 r. 3

For the Plaintiff - S. Sahathevan; M/s. Battenberg & Talma, Advocates
For the 5th Defendant - T.O. Thomas; M/s. Thomas & Co., Advocates

JUDGMENT

Chong Siew Fai J:

There are three applications by way of summons-in-chambers before me:

1. the plaintiff's application dated 8 June 1989 to strike out the 5th defendant's defence and for judgment to be entered in the sum with interest and costs claimed in the action;
2. the 5th defendant's application dated 21 March 1990 for dismissal of the plaintiff's action for want of prosecution, or alternatively, as being vexatious or an abuse of the process of the Court, and costs; and
3. the plaintiff's application dated 4 September 1990 for leave to discontinue the action against the 5th defendant and for costs of the application.

Background of Case

The plaintiff instituted this action for recovery of various sums totalling RM1,334,171.14, and interest at diverse rates on various sums against the 1st defendant as principal and against the other six defendants as guarantors of whom the 5th defendant was one. There is also a claim for "costs on a solicitors clients basis".

The 5th defendant delivered a defence dated 20 April 1989.

On 4 May 1989 judgment in default of appearance was entered against the 1st and the 7th defendants. The default judgment also included "costs on a solicitors clients basis to be taxed".

The plaintiff then took out the application dated 8 June 1989 mentioned above for striking out the 5th defendant's defence and for entry of final judgment and costs.

By 15 August 1989 the judgment debt and the costs as awarded were fully settled by the other defendants. And on 14 October 1989 this action was discontinued as against all the other defendants except the 5th defendant.

On 22 March 1990 the 5th defendant filed application 2 above for dismissal of the action for want of prosecution or as being vexatious or an abuse of the process of the Court and costs.

On 4 September 1990 the plaintiff filed application 3 above for leave to discontinue this action and for costs of the application.

Plaintiff's summons dated 8 June 1989 for striking out the defence and for judgment.

As the claim of the plaintiff had not been settled or liquidated by 8 June 1989, the plaintiff was, at least procedurally, justified in taking out on that date the application against the 5th defendant for striking out the defence and for judgment.

For the 5th defendant it was submitted that there had been delay in effecting service of the summons on the 5th defendant through his advocate which was served on 13 March 1990. In this regard, the explanation of the plaintiff was that the summons was first brought up for hearing on 13 September 1989. Service had not by then been effected for the reason that negotiation for settlement between the plaintiff and some other defendants was going on. On 13 September 1989 the summons was adjourned to a date to be fixed. And the next hearing date fixed by the Court registry (with which the fixing of dates lay) was 14 June 1990. I consider the explanation reasonable. It is also, to my understanding, the usual practice to effect service after a date for hearing has been fixed, that is, in the context of the present case, to effect service on or after 9 March 1990, the date of the notice of rescheduled hearing (see paras. 3 and 4 of the "notes of submission" dated 9 May 1991 of the 5th defendant).

Counsel for the 5th defendant cited *Lum See On v. Chan Kit Yong* [1956] 22 MLJ 40 as a reason in support of his contention on the delay in hearing the summons dated 8 June 1989 heard on 14 June 1990, that is, more than one year after its issue. In *Lum See On's* case, *supra*, (a tenancy case) the defendant, who obtained letters of administration to a deceased tenant's estate prior to the commencement of the action, claimed protection of the Control of Rent Ordinance. By the date of the trial of the action, the grant of the letters of administration to the defendant had been revoked. It was held that the relevant date for determining the rights of the parties was the date of the hearing and that since on that date the defendant had ceased to be the legal personal representative of the deceased, she could not claim protection of the said Ordinance. In the present case before me, the plaintiff has no desire to proceed with the summons dated 8 June 1989 for the sake of obtaining a judgment for the sum claimed; the plaintiff, however, as I have said earlier, was justified in taking out the summons on that date. I find *Lum See On's* case *supra*, of no assistance in the circumstances.

As I have just stated, the plaintiff has no wish to proceed with the summons for striking out the defence and for judgment. This is due to the fact that its claim had been fully settled by some defendants other than the 5th defendant. Through its Counsel, the plaintiff wrote on 13 September 1989 to inquire if the 5th defendant would agree to have the action discontinued with each party paying its own costs. The 5th defendant was agreeable but only on payment of RM5,000 costs: (see paras. 8 and 9 of the affidavit of John Ko affirmed on 16 July 1990 and the exhibits referred to therein). The main obstacle then, as reflected by the correspondence, was the question of costs.

Counsel for the 5th defendant also dwelt on the strength of the defence case. I am not inclined to go into the merits. By reason of settlement of the claim, the plaintiff no longer wishes to proceed with the summons dated 8 June 1989 with the view of obtaining judgment as prayed. Moreover, there are further developments: the plaintiff is seeking leave to discontinue the action, and the 5th defendant is applying to have the action dismissed. In the circumstances, it would be futile to decide whether judgment for the sum claimed is to be entered, and would, in my opinion, be a waste of time to try the application on its merits merely for the sake of question of costs.

In *J.T. Stradford & Son Ltd. v. Lindley & Ors. (No.2)* [1969] 1 WLR 1547 of which I shall say more in a moment, the Court of Appeal refused to go into the merits of the case for the purpose of deciding question of costs despite the existence of an earlier order of "costs in the cause" granted by the House of Lords. The present action before me is, to my mind, a stronger case for declining to deal with the merits since there is no prior order of costs as in *J.T. Stradford's* case above-mentioned.

For the above reasons and having regard to my decision below on the other two applications, I consider it fair and just to strike out the application dated 8 June 1989 without deciding on its merits. I so order. In the exercise of the discretion of the Court, I also order that there be no order as to costs.

5th defendant's application dated 21 March 1990 for dismissal of action.

Plaintiff's application dated 4 September 1990 for leave to discontinue action.

I propose to deal with the two applications together. The case of *J.T. Stradford & Son Ltd. v. Lindley & Ors. (No. 2)* [1969] 1 WLR 1547 is, to my mind, illuminating and of assistance. Apart from the elements of the restoration of an interlocutory injunction by the House of Lords and

the ordering of costs to be costs in the cause, the said case contains features similar to our present action. That case went to sleep for more than 3½ years after the pleadings were closed. Then the defendant applied to dismiss the action for want of prosecution under O. 25 r. 1(4) (English), and the plaintiff applied for leave to discontinue the action under O. 21 r. 3(1) (English), each party asking for costs to be paid by the other side. (The provisions of the said Orders and Rules are similar to those contained in our Orders and Rules of the same numbers). Neither side wished to continue the action, and neither side wanted to pay the costs thus far incurred. The Court of Appeal, in upholding the decisions of the master and the Judge, granted leave to discontinue the action and ordered each party to pay its own costs.

In his judgment Lord Denning MR said (p. 1553 E-F):

> It is plain that neither side wishes to go on with the action so as to get his own costs. But neither side wishes to pay the other side's costs. Each will fight rather than pay the other side's costs. So what is to be done? Is this case to go on simply about costs? I think not.

At a later stage, he continued (p. 1554 B-D):

> Mr. Campbell has urged us to award the plaintiffs the costs because they would very probably have won if the action had been tried out on its merits. I decline to go into that question. We cannot try the action at this stage. I put aside the respective merits of the dispute ... I think that we should not dismiss the action under O. 25 r. 1(4) for want of prosecution. I think the Court should give the plaintiffs leave under O. 21 r. 3 to discontinue. That rule gives the Court a wide discretion as to costs ... Finding that neither side wishes to go on with this action, I think the master and the judge exercised their discretion wisely in giving leave to discontinue on the footing that each side is to bear its own costs. The order should be that the action be discontinued, each side paying its own costs

Having considered arguments by Counsel of both sides and on the facts and circumstances of our instant case, the proper order, in my judgment, and which I now make, is to give leave to the plaintiff for the action to be discontinued and, in the exercise of the discretion of the Court under O. 21 r. 3, order that each party pays its own costs.

One further matter I would deal with. In the course of the submissions, it was contended for the 5th defendant to the effect that affidavits filed on behalf of the plaintiff and not expressly or specifically mentioned as relating to the two summonses dated 21 March 1990 and 4 September 1990 should not be used in considering any of the two summonses. I wish to say this: I have not dismissed the action under the summons dated 21 March 1990 but have given leave under O. 21 r. 3 to the plaintiff to discontinue the action. If I had in any way been influenced by any of the affidavit evidence complained of, it was purely on the question of costs. In *Computer Machinery Co. Ltd. v. Drescher & Ors.* [1983] 3 AER 153, there was no trial, and on the issue of costs it was held that there was no rule which prevented evidence relevant to costs from being considered though it had not already been admitted, and that it was a matter for the Court in its unfettered discretion to admit any evidence which it considered relevant (p. 158). In our instant case, the affidavit evidence was filed in Court except that no notice of intention to use thereof was given.

Also found at [1991] 3 CLJ 1794